



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1994

Ms. Betsy Elam
Fielding, Barrett & Taylor, L.L.P.
3400 Bank One Tower
500 Throckmorton Street
Fort Worth, Texas 76102-3821

OR94-729

Dear Ms. Elam:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26304.

The City of Azle (the "city"), which you represent, received two open records requests for complaints and memoranda regarding former Police Chief Marvin Ivy. You state that you have released some of the requested records to the requestors, but seek to withhold other records pursuant to sections 552.101, 552.102, 552.103, 552.108, and 552.111 of the Government Code.¹

Because section 552.103 is the most inclusive of the exceptions you raise, we will discuss this exception first. To secure the protection of section 552.103, the "litigation" exception, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991) at 1. In this regard, you inform this office that a former police department employee who

¹You state that some of the memoranda at issue were submitted by city police officers to the city manager "upon his promise that the memorandums would not be disclosed to anyone." Information is not confidential under the Open Records Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested records fall within one of the act's exceptions to disclosure, they must be released, notwithstanding any agreement between the city manager and the police officers specifying otherwise.

accused the former police chief of sexual harassment has, along with other individuals, filed a lawsuit under the Texas Whistle Blower Act, chapter 554 of the Government Code, against the city in connection with her subsequent termination in *Connie Michele Reger and Dena Rechel Latta v. City of Azle*, No. 94-04101 (353rd Dist. Ct., Travis County, Tex.).

You have not explained, nor is it clear from the face of many of the documents at issue how those materials "relate" to the legal and factual issues in the whistle blower action. However, we need not in this instance determine whether you have met your burden under section 552.103. The purpose of the litigation exception is to "enable[] governmental entities to protect their position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery, if at all." Open Records Decision No. 551 (1990) at 3. This office has learned that, since the time that you requested an open records decision from this office, the city has made the records at issue available to the plaintiffs in the lawsuit through civil discovery. Absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Because the city has released these records to the plaintiffs, there is no justification for now withholding the records from the requestors pursuant to section 552.103.

We next discuss your claims under sections 552.101 and 552.102. Because these two sections protect similar interests, we will discuss them in tandem. Section 552.102 is designed to protect public employees' personal privacy. The scope of section 552.102 protection, however, is very narrow. See Open Records Decision No. 336 (1982); see also Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

The information at issue pertains primarily to the former police chief's actions as a public servant, and as such cannot be deemed to be outside the realm of public interest. Section 552.102 was not intended to protect this type of information. See also Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). We have identified, however, a few small portions of the records at issue that do pertain to individuals' private affairs that meet the above described test for common-law privacy. We have marked in brackets the information that the city must withhold under sections 552.101 and 552.102.²

²We note, however, that although under certain circumstances the names and statements of individuals complaining of sexual harassment come under the protection of common-law privacy, see *Morales*

You also contend that section 552.101 of the Open Records Act, pursuant to the informer's privilege, excepts from public disclosure all witness statements regarding the allegations of sexual harassment against the former police chief. Similarly, you contend that the names and statements of persons interviewed in the course of an internal affairs investigation into certain other allegations against the former police chief come under the protection of section 552.108, the "law enforcement" exception. In this instance, you do not contend that the requested information pertains to a pending criminal investigation. One reason for withholding names and statements of witnesses, despite the absence of a criminal prosecution, is that disclosure might subject the witnesses to intimidation or harassment. *Open Records Decision No. 252 (1980)*. However, where no criminal investigation is pending, this factor must be examined on a case-by-case basis before governmental bodies may withhold such information. *Id.*

Part of the purpose of the informer's privilege is to prevent retaliation against informants; the privilege therefore does not apply when the complainants' identity is known to the accused. *See Open Records Decision No. 208 (1978)*. Because the former police chief has been made aware of the allegations against him and the names of his accusers, the informer's privilege is inapplicable here. *See id.* For similar reasons, the city may not withhold any of the information at issue pursuant to section 552.108.

Finally, we address your section 552.111 claim. Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process.³ *Open Records Decision No. 615 (1993)* at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In *Open Records Decision No. 615* at 5, this office held that

(Footnote continued)

v. Ellen, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), in this instance the complainant has waived any privacy interest she may have had in this type of information by filing her lawsuit against the city. *Id.* at 525.

³In *Open Records Decision No. 429 (1985)*, this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also Open Records Decision Nos. 283, 273 (1981)*. This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. *Open Records Decision No. 464 (1987)*; *see Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972). In this regard, we note that all of the memoranda that you have marked as being protected by section 552.111 were created at the request of the city manager by police department employees. We therefore believe the information contained in the memoranda was intended for use in the city's deliberative process.

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

After reviewing the records at issue, we conclude that some of the information you have marked as coming under the protection of section 552.111 consists of the authors' opinions and advice regarding policy matters within the city's police department. On the other hand, other information you have marked is either factual in nature or pertains solely to personnel matters which fall outside the scope of section 552.111 protection. We have marked in brackets those portions of the records that the city may withhold pursuant to section 552.111. The city must release all remaining portions of these records, except as discussed above.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/RWP/rho

Ref.: ID# 26304

Enclosures: Marked documents

cc: Mr. Ken Dilanian
Fort Worth Star-Telegram
P.O. Box 1870
Fort Worth, Texas 76101
(w/o enclosures)

Ms. Jan E. Hemphill
Attorney at Law
4519 West Lovers Lane
Dallas, Texas 75209
(w/o enclosures)